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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID PRICE,

Petitioner,

—v.—

VIKING PENGUIN, INC. and PETER MATTHIESSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MARTIN GARBUS*
RICHARD KURNIT
GERALD E. SINGLETON
Frankfurt, Garbus, Klein & Selz, P.C.
488 Madison Avenue
New York, New York 10022
(212) 980-0120

Attorneys for Respondents

*Counsel of Record

32 pp

QUESTION PRESENTED

Whether the court of appeals departed from First Amendment standards enunciated by this Court in holding that the accurate reporting of opinions and charges of alleged misconduct by a Special Agent of the Federal Bureau of Investigation in the performance of his offical and public duties in a book of historical analysis and commentary is constitutionally protected where the statements in dispute are based on court records and transcripts, government documents and statements made in public proceedings.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
RULE 28.1 LIST	vi
STATEMENT OF THE CASE	1
A. DECISION OF THE COURT OF APPEALS	2
B. FACTS MATERIAL TO THIS COURT'S CONSIDERATION OF THE QUESTION PRESENTED	4
THE CHALLENGED STATEMENTS	9
LOUIS MOVES CAMP	9
MYRTLE POOR BEAR	11
ANNA MAE AQUASH	13
C. THE COURT OF APPEALS' ANALYSIS OF THE CHALLENGED STATEMENTS	14
REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED	17

PAGE

A. THE COURT OF APPEALS' FACT/ OPINION ANALYSIS IS CONSISTENT WITH THE ANALYSIS EMPLOYED IN OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT 18

B. THE COURT OF- APPEALS ADHERED TO THE STANDARDS OF INDEPENDENT REVIEW LAID DOWN BY THIS COURT..... 21

C. THE NEUTRAL REPORTAGE DOCTRINE WAS NOT NECESSARY TO THE COURT OF APPEALS' HOLDING THAT THERE WAS NOT SUFFICIENT EVIDENCE OF ACTUAL MALICE WITH RESPECT TO ANY PARTICULAR STATEMENT 22

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 3, 21

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 21, 24

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 18

Garrison v. Louisiana, 379 U.S. 64 (1964)..... 23

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970)..... 18, 20

Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989)..... 19, 21, 23

Hustler Magazine v. Falwell, 108 S.Ct. 876 (1988)..... 20, 23

Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), and 788 F.2d 1300 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883 (1987) . 22

Marshall v. State, 305 N.W.2d 838 (S.D. 1981) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 3, 4, 20, 21

Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974)..... 18

Pennekamp v. Florida, 328 U.S. 331 (1946) ... 21

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)..... 3

PAGE

St. Amant v. Thompson, 390 U.S. 727 (1968) . 23

Time, Inc. v. Pape, 401 U.S. 279 (1971) 18

United States v. Banks and Means, 383 F. Supp. 398 (D.S.D. 1974)..... 10

United States v. Peltier, 585 F.2d 314 (8th Cir. 1978)..... 11

RULE 28.1 LIST

Viking Penguin, Inc. is now, by change of its corporate structure, an unincorporated division of Penguin Books USA Inc. The parent company of Penguin Books USA Inc. is Pearson Inc. All subsidiaries of Penguin Books USA Inc. are wholly owned.

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STATEMENT OF THE CASE

This libel action concerns a book of great scope and complexity by one of America's most respected authors, Peter Matthiessen, a National Book Award winner and member of the National Institute and American Academy of Arts and Letters.[1] *In the Spirit*

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1 "Ex." references throughout are to the three volumes of exhibits (C.R. Doc. XXXIX, XL, XLI) accompanying the 172 page affidavit of Peter Matthiessen (C.R. Doc. XXXVI) ("Matth. Aff.") in which the author carefully documented his sources and grounds for belief as to the accuracy of every statement alleged in the complaint to be defamatory.

of Crazy Horse (the "Book") is a monumental work of historical analysis and commentary about issues of national importance concerning the administration of justice which have been the subject of an intensive and on-going public debate in this country for more than a decade. This action concerns the reporting of charges of a pattern of governmental abuse of rights of traditional Indian people, to whom the Book is openly dedicated.

The plaintiff, David Price, is a Special Agent of the FBI, whose official conduct in the investigation and prosecution of major crimes committed on the Pine Ridge Reservation in South Dakota in the 1970's, particularly in the federal prosecution of Dennis Banks and Russell Means and the investigation into the killing of two FBI agents, became the subject and focus of serious charges and countercharges of FBI misconduct by, amongst others, prominent attorneys, Congressmen, the Canadian government, the United States Commission on Civil Rights and various civil liberties groups, including Amnesty International.

A. DECISION OF THE COURT OF APPEALS

In unanimously affirming the district court's grant of summary judgment after several years of litigation and discovery, the Eighth Circuit's decision makes no new law. Rather, it succinctly states and follows well established principles firmly established in decisions of this Court and in no way conflicts with the decisions of any other circuit. The common law of libel has always required a false statement of fact as the basis for a libel claim. An opinion cannot be the basis for a libel claim.

A public official cannot prove reckless disregard for the truth where an author accurately reports the historical fact of an unproven accusation, publicly made in the course of judicial and official proceedings. Our modern history, from Senator Joseph McCarthy's downfall due to unproven accusations that General George C. Marshall, among other Americans, was a Communist to rampant speculation of individual culpability in "Watergate," "Irangate," and now HUD, is filled with "accusations" of historical significance. If *New York Times Co. v. Sullivan* has any meaning, it is that journalists and historians may accurately recount the accusations of governmental misconduct.

The Eighth Circuit followed explicitly this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). It is clear from the court's opinion that it gave full weight to what plaintiff claimed he could prove, but found his evidence insufficient as a matter of law to meet his burdens. Plaintiff's argument is that this Court should now overrule *Anderson* and prohibit independent appellate review of the record until plaintiff has dragged defendants through a protracted jury trial. The Eighth Circuit's careful consideration of each of Price's points establishes the propriety of the court's analysis.[2]

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2 The Eighth Circuit did not hold that the evidence must be considered in the light most favorable to the media defendants. Like the district court, 676 F. Supp. 1501, 1504 (Pet. App. at A-60) ("the facts must of course be viewed in the light most favorable to plaintiff"), the court of appeals accepted and credited all facts plaintiff

B. FACTS MATERIAL TO THIS COURT'S CONSIDERATION OF THE QUESTION PRESENTED

Price was instrumental in locating and preparing Louis Moves Camp and Myrtle Poor Bear, key witnesses in the most important prosecutions of Indian leaders in the 1970's (the prosecutions of Banks, Means, Richard Marshall and Leonard Peltier). Both of these witnesses gave very damaging, utterly false and perjurious testimony concerning events at which they were not even present. As a result Agent Price assumed a central role in one of the major controversies of the 1970's.

The only specific charges of wrongdoing against Price in the Book come not from the author but from the opinions of learned judges, lawyers and participants in the events, and, in certain instances, from Price himself. Over the years, Price's name surfaced repeatedly in complaints of FBI misconduct involving the alleged use of threats, excessive force and intimidation, and his conduct was later singled out for criticism by several judges and, in turn, defended by the highest ranking officials in the FBI, including former FBI Directors William Webster and Clarence Kelley. (*E.g.*, Pet. App. at A-31-33). Among those questioning Price's conduct was federal district Judge Nichol who found there was prima facie evidence of miscon-

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asserted. (*See* Pet. App. at A29-30 and A38-39 for specific examples.) Plaintiff's suggestion that the district court and court of appeals erred in holding that an FBI agent with full governmental power to arrest, interrogate, and intimidate is a public official under *New York Times Co. v. Sullivan* requires no discussion. (*See* Pet. App. at A6-7 and A75-76.)

duct.[3] As a result of Price's offical public conduct and the allegations against him, Price became the most despised FBI agent on the Reservation and had to be removed from South Dakota, at the request of his superiors, who feared his mere presence was likely to provoke further violence.[4]

Price does not deny the existence of the allegations or the essential facts contained in FBI records, governmental reports and judicial opinions, upon which the author relied, which show that Price was at the center of public controversies that raged around sensitive issues of national importance. Instead, he nitpicks, complains of Matthiessen's tone and style and totally distorts the record to suggest that the district court and the unanimous panel of the Eighth Circuit overlooked evidence of a specific false statement of fact published with a high degree of awareness that it was probably false.

Matthiessen was not the first to write about the events described in the Book, or Price's specific involvement in those events. The exact same allegations against Price and the FBI have appeared in the

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3 Price reported to his superiors that "there was a possible charge of obstruction of justice against WILLIAMS and myself along with other additional unnamed charges. . . . [T]he Judge had stated that there was prima facie evidence of misconduct by myself." (Ex. 33 at 12).

4 (Ex. 144) (Memo to FBI Director from Rapid City FBI requesting that Price be transferred out of South Dakota) ("Several individuals, including Tribal President Al Trimble, Pine Ridge, South Dakota, advised SA Price is resented by a large segment of the Indians on the Pine Ridge Reservation and his continued presence could precipitate an incident.").

press (Ex. 35-42, 62-64, 69, 95, 96, 116, 188), and in other books (see Pet. App. at A-16), and have been the subject of focused Congressional inquiries. (Ex. 97). They have unquestionably become a part of the historical record. In writing about the events, however, unlike many other accounts, Matthiessen brought eloquence and insights, and a depth of concern, that gave new voice to the grievances and opinions of the Indians. Matthiessen also fully reported the denials of Price and the FBI (*e.g.*, Book at 95-96 (FBI Agent Williams), at 97 (Assistant U.S. Attorney Hurd), at 247, 254, 306-08, 345, 456-57, 461-72, 480 (Price), at 264, 267 (FBI Director Kelley), at 298 (Assistant U.S. Attorney Sikma), at 298, 308 and 498 (Assistant U.S. Attorney Hultman), at 473 (FBI Director Webster), and at 474 (FBI Agent Zigrossi). Matthiessen even devoted an entire chapter to explaining Price's view of events, largely in Price's own words (at 453-76), not one word of which is challenged or alleged to be inaccurate by Price in his sworn deposition testimony, because Matthiessen believed that Price was "regarded wrongly as the villian of the tale" (at 472) and that "[f]airly or not, Price had come to personify the most cynical abuses of the FBI's regressive attitude towards Indians and it seemed important to hear his side of the story" (at 460).

As Matthiessen's affidavit (C.R. Doc. XXXVI) and deposition testimony (C.R. Doc. LI, LIII and LVI-LX) overwhelmingly demonstrated, Matthiessen had at least two sources for every disputed statement, having marshalled the facts and opinions he reported from an extensive historical record, including court opinions, transcripts, FBI documents and personal

interviews. In presenting the underlying factual material upon which the allegations and opinions are based, Matthiessen quoted extensively from court opinions, trial transcripts and governmental records, presenting the views of judges (*e.g.*, Book at 95, 96, 99 (Judge Nichol), at 371-73 (Judge Ross), at 475 (Chief Justice Wollman), at 353 (Judge Benson), and at 459 (Judge Tice)), and participants in the events, including statements by the FBI and others explaining and defending the FBI's conduct (*e.g.*, at 261 (FBI Agent Wood), at 262-63 (Dr. Peterson), at 264 (FBI Agent Zigrossi), at 272 (FBI memo), at 312-13 (FBI Director Kelley), and at 314-15 (Assistant U.S. Attorney Hultman)), together with pages and pages of testimony from actual court proceedings (*e.g.*, at 304-08, 371-73).

Throughout the Book, in text and in footnotes, from the dedication to the endnotes, Matthiessen fully discloses and reminds the reader that his sympathies lie with the Indians, often presenting the Indians' opinions and grievances in their own words. He cautions and warns the reader that the information "comes from many sources, which are not always in agreement" (Book at 577), and he is careful to separate accusation from fact and present the material in its historical context, noting in particular that the allegations concerning Price are only "suspicions" (Complaint ¶ 10i), "suggestions" (¶ 10m) "speculations" (¶ 10s) and "disputed" (¶ 10b). He lists for the reader numerous other sources of published information offering differing viewpoints, "all of which are highly recommended to the reader who wishes to investigate various aspects of the story in more detail." (Book at 577).

In every instance, the speaker's political leanings, background and biases, and criminal history, if any, are fully set forth for the reader, as are all denials, public or otherwise, with respect to the allegations. Nowhere does Matthiessen say that he has concluded that the charges are true or imply that he is privy to any undisclosed facts. The Book, on its face, clearly argues a position and articulates a thesis, but it leaves it to the reader to judge the credibility of the proponents and the creditability of the allegations.

Matthiessen did not invent anything. He consulted other writers, interviewed dozens of participants, and examined thousands of pages of trial transcripts, court opinions and FBI documents released under the Freedom of Information Act. (Matth. Aff. at 8). He later called upon numerous lawyers, experts, scholars and participants to check drafts of his manuscript prior to publication and made corrections and revisions accordingly. (*Id.* at 9-10; Matth. Dep., C.R. Doc. No. LIII at 123-26; LX at 1105-10; LVII at 557-58, 640). Finally, prior to publication, the manuscript was submitted to several knowledgeable libel experts, including the publisher's outside counsel, who cleared it for publication. (Sifton Dep., C.R. Doc. No. LIV at 114-15).

THE CHALLENGED STATEMENTS

In recounting highly publicized historical events surrounding the government's prosecution of various Indian leaders and particularly that of Dennis Banks, Russell Means, Richard Marshall and Leonard Peltier, Matthiessen found that three episodes of FBI misconduct appeared prominently in numerous governmental reports, court briefs, decisions and testimony, and in the FBI's responses to various complaints and inquiries referring to the same matters (*e.g.*, Ex. 120): the perjurious testimony of Louis Moves Camp; the contradictory affidavits and fabricated testimony of Myrtle Poor Bear; and the bungled autopsy and investigation by the FBI of the murder of Anne Mae Aquash, a suspected key witness. Matthiessen and other writers before him found that one FBI agent stood out in all of the complaints: David Price.

Louis Moves Camp

Louis Moves Camp, a surprise prosecution witness in the Wound Knee criminal trial of Dennis Banks and Russell Means, one of the largest and most highly publicized trials in this century, was under Price's care. His testimony was quickly proven to be unfounded and utterly perjurious (Ex. 26, 44). The Book details Price's involvement with the witness and liberally quotes from the published opinion and remarks in open court of presiding Judge Nichol, who found the testimony of Moves Camp to be "the most bizarre incident in the trial" (Ex. 26 at 21,744) and ultimately dismissed the case based on a pattern of prosecutorial misconduct, finding that the "waters of

justice have been polluted." *United States v. Banks and Means*, 383 F. Supp. 398, 397 (D.S.D. 1974).

Matthiessen demonstrated his good faith reliance and supported every detail of his account by reference to FBI 302s and memos (Ex. 3-6, 33-34), prior statements given to the FBI by Moves Camp (Ex. 20), his fellow agent (Ex. 24), the prosecutor (Ex. 25), the local police sergeant with whom Price met (Ex. 44), Congressional reports (Ex. 18), briefs (Ex. 8), contemporaneous press accounts (Ex. 9-13, 17, 22-23, 27-28, 35-42), and other books (Ex. 14-15), which show that Moves Camp was a last minute surprise witness located by Price, who supplied vital testimony filling in the gaps in the prosecution's case, with patently false and easily disproved testimony, and that, prior to his testimony, Price and his partner had gotten Moves Camp drunk and later interceded with local authorities to help Moves Camp avoid prosecution for a rape he allegedly committed while under their custody, in order to secure his testimony, yet failed to record any of the details of this "sordid story" (Judge Nichol's characterization) in FBI 302s, or make any attempt to confirm Moves Camp's amazing testimony.

Matthiessen set forth the facts, statements and opinions of the participants (Book at 95-99) and Price's denials (*id.* at 472), without accusing Price of any wrongdoing. In the final analysis, all that Price objects to is an observation taken out of context which presents for the readers' consideration the "all but inescapable conclusion that Agent Price and perhaps Agent Williams had knowingly prepared this man to give false testimony; at the very least, they

found his story so convenient that they had not bothered to find out if it was true." (*id.* at 98).

Myrtle Poor Bear

The Myrtle Poor Bear incident presents two further, almost identical, parallel situations. Like Moves Camp, she was a last minute prosecution witness in the murder trial of Richard Marshall (Ex. 50-51), "supplied" by Price (Ex. 52)(FBI's word), who in filling in all the missing pieces (Ex. 49-51, 62-64), was threatened, intimidated and possibly coached by Price (Ex. 65-70, 104-108, 111), into giving false testimony (Ex. 8, 49, 55, 71). Price also obtained three affidavits from Poor Bear for use in Peltier's Canadian extradition proceedings (Ex. 72, 73, 75), which were plainly inconsistent, as were the FBI 302s pertaining to Price's interviews of Poor Bear (Ex. 74, 76), leading to the inescapable conclusion, noted by Judge Ross in *United States v. Peltier*, 585 F.2d 314, 335n.18 (8th Cir. 1978), and later by Chief Justice Wollman in *Marshall v. State*, 305 N.W.2d 838, 844 (S.D. 1981) (dissenting opinion), that her testimony was obviously contrived and that the FBI had something other than justice in mind in procuring affidavits from her.

Here again, Matthiessen's description of the underlying events, the proceedings, the testimony, the accusations and the ensuing controversy, which were widely reported in the press (Ex. 51, 62-64, 68-69, 94-96, 102, 108, 109), on television (Ex. 111), and recounted in other books (Ex. 15, 110), is based on and fully supported by FBI records (Ex. 52, 53, 56, 58, 74, 79, 82, 89, 90), Poor Bear's testimony (Ex. 60, 61, 65, 66, 104, 105), Price's testimony (Ex. 55), the

testimony of numerous witnesses (Ex. 67, 80, 81, 93), including Price's fellow agent (Ex. 71), statements by the prosecution (Ex. 103), briefs (Ex. 8, 49, 112), transcripts of court arguments (Ex. 78, 106), and the remarks of judges in published opinions (Ex. 50, 70, 83). And, again, Matthiessen also set forth Price's denials, not only in Price's own words (Book at 454-56, 472), but as supported by FBI Director William Webster's subsequent investigation and report (*id.* at 473).

The FBI's conduct, and Price's involvement in particular, became the subject of complaints and inquiries by many Congressmen (Ex. 97-99), the House Judiciary Committee (Ex. 54, 99), the Canadian Government (Ex. 85-88), respected attorneys (Ex. 54, 57, 84), the FBI's Office of Professional Responsibility (Ex. 100), and the United Nations Human Rights Committee (Ex. 101).

Price has admitted knowing that Poor Bear was mentally unbalanced, that he was afraid to be alone with her because she would say she was in love with him, and that he always believed that at least one portion of her affidavit was complete fabrication and inherently incredible. (Price Dep., C.R. Doc. XLV at 62-62, 193). The prosecutor acknowledged in open court that her affidavits were false and that she was utterly incompetent. (Ex. 78). Judge Ross found that the FBI "continued to extract more to put into the affidavits" by "pressuring" the witness, evidencing a willingness to "fabricate other evidence", and that the use of her affidavits "was, to say the least, a clear abuse of the investigative process by the FBI." (Ex. 78, 83). (*See* Pet. App. at A-30-31).

Anna Mae Aquash

The suspicious circumstances surrounding the death of Anna Mae Aquash, a well-known Indian woman who had been actively sought for questioning by the FBI as a key witness in the *ResMurs* investigation, and the FBI's conduct in investigating her death is a separate but related subject of discussion in the Book. It is another essential part of the history of government attitudes towards Indians in which Price played a pivotal role and it has been the subject of prior books and numerous articles. (*E.g.*, Ex. 14, 15, 115, 116, 118, 128). The United States Commission on Civil Rights (Ex. 133), various Congressmen, the Canadian government, and the U.S. Attorney General (Ex. 132, 134), amongst others, have found the FBI's treatment of Aquash's corpse extremely suspicious (cutting off her hands and failing to observe a bullet hole in her head), and have particularly questioned Price's failure to identify her body or even suggest that it might be Aquash. Price knew her and had been looking for her prior to her death; although not his case, he drove a hundred miles to view the scene where her body was discovered, attended her autopsy and took pictures of her with his personal camera, facts which he admits (Price Dep., C.R. Doc. XLVI, at 63, 67, 79-81, 94-96, 195-96, 202-205). FBI records (Ex. 123-25), Price's testimony in other proceedings (Ex. 126), affidavits, briefs and interviews (Ex. 106, 115, 117, 119, 120), as well as other journalistic accounts, confirm his prior contacts and familiarity with her physical appearance.

The Book reports the facts and the various allegations, suspicions and theories which have arisen with regard to Aquash's death without espousing a belief

in any of them. Matthiessen openly questions the creditability of the rumors and beliefs, dispelling rather than espousing them, and concludes that "despite occasional suggestions to the contrary and lurid articles on the case, no one I talked to makes the serious claim that David Price killed Anna Mae Aquash." (Book at 446).[5]

C. THE COURT OF APPEALS' ANALYSIS OF THE CHALLENGED STATEMENTS

Analyzing the Book's discussion of the Moves Camp incident, the court of appeals found that the isolated statement concerning Moves Camp challenged by Price (Pet. at 7) reflects a consideration of possibilities and likelihoods which, in the context of the entire discussion, would be understood by readers as an opinion on disclosed facts from the public record, which were fully reported and substantially accurate and, indeed, mirrored the sentiments expressed by Judge Nichol who found Price's conduct outrageous and his account of events to be incredible. The court of appeals also found that Price's bare denials, without supporting proof, were not sufficient to establish falsity of the statements, particularly in view of his failure to challenge the

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5 Price claims that the author's awareness that certain charges were not creditable, as the Book plainly states, provides direct evidence of actual malice which the court of appeals ignored (Pet. at 12). Here, as in other places, Price grossly distorts the record and ignores the plain text of the Book. Price does not dispute the existence of any of the charges, claims or rumors (Book at 472) and nowhere does Matthiessen adopt them as his own, as the court of appeals properly found.

essentials of the author's account. (Pet. App. at A-20-27).

The court of appeals likewise found that the challenged statements with regard to the Book's discussion of Myrtle Poor Bear were privileged as an accurate report of statements made in judicial proceedings and governmental reports. Here, again, the court of appeals found that the Book's discussion of allegations of exploitation, misconduct and mistreatment by Price not only mirrored the comments of judges and others, but in context reflected opinions on disclosed facts based on public proceedings. (Pet. App. at A-27-34).

Concerning the Book's report of suspicions concerning Price's suspected involvement in the killing of Anna Mae Aquash, the court of appeals found, as the Book makes clear, that the author made no direct accusation, but to the contrary, exonerated Price and fully set forth Price's denials with respect to vague "suspicions" about his "involvement", and presented the material in the context of testimony from actual court proceedings by Price and others, as to which Price could neither show falsity or reckless disregard for the truth. (Pet. App. at A-34-39).

The court of appeals conducted an independent review of all of the material at issue, reading the Book in its entirety and drawing its own independent conclusions as to whether the statements in context would be understood as statements of fact or opinion, as it properly should. The court of appeals carefully considered all of Price's claims that quoted statements and opinions generally suggested a pattern of corruption, harassment and dishonesty on his part, finding

each of them to be clearly in the realm of protected opinion.[6]

The court of appeals did not, as petitioner states (Pet. at 4, 27-28), view Price's alleged factual evidence of falsity in the light most favorable to the nonmovant, as the opinion below plainly demonstrates. In two specific instances, where material to the thrust of the allegations, the court of appeals credited Price's denials and viewed the factual evidence in the light most favorable to him, as did the district court (Pet. App. at A-60), but concluded that there was insufficient evidence to show by clear and convincing evidence that Matthiessen knew or should have known that a particular statement was false (Pet. App. at A-29-30) (that Riggs knew of Poor Bear's condition and could have told Price); and (*id.* at A-38-39) (that Price conducted a warrantless search and arrest). In other instances, again viewing the factual evidence in the light most favorable to Price, the court of appeals found that the alleged factual discrepancies cited by Price were not substantial or material.

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6 Choosing what he claims is a prime example of this type of charge, Price refers to a direct quote from a defense attorney, Kenneth Tilsen (Pet. at 10) ("In my opinion, David Price is one of the most corrupt and vicious agents in the FBI. . . ." (Book at 461)), who testified and confirmed at his deposition that this is his opinion of Price. (Tilsen Dep. at 97, 109). This type of vague and unspecified vituperation (publicly made) is not the equivalent of a charge of specific criminal conduct but, on the contrary, is clearly opinion even in the vacuum in which Price seeks to present it.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

This case does not involve questions of first impression, but rather the application of well-established First Amendment principles concerning the protection of political speech and the expression of opinions on disclosed facts. Nor is there any split or conflict among the circuit courts of appeals concerning the applicable standard of review or the substantive principles for determining when and whether a statement concerning the conduct of government and its officials is actionable. The decision of the court of appeals affirming the district court's summary judgment is correct and does not conflict with any decision of this Court. Accordingly, further review by this Court is not warranted.

The enormous factual record considered by the court of appeals, coupled with a reading of the Book, demonstrates not only that plaintiff could not establish that any particular statement was knowingly published by either the author or publisher with a high degree of subjective awareness of probable falsity, but further that, given the form, manner and presentation of the material, none of it is actionable. It is the kind of political speech about government and its officials that warrants maximum "breathing space" under the First Amendment.

Through this petition, Price seeks yet another forum to challenge Matthiessen's view of history, answer the FBI's critics and litigate historical truth. Under petitioner's distorted view of the law, the evolving opinion defense recognized by virtually every federal and state court that has addressed the issue

should be overruled and a public official should, on the basis of his own unsupported denials, be given a jury trial as a matter of course subject to strict scrutiny and independent review only on appeal. But such an approach has never been sanctioned by this Court and would undoubtedly lead to heavy self-censorship, effectively stripping the First Amendment of the "breathing space" necessary for robust political speech and debate on issues of public and national concern.

A. The Court of Appeals' Fact/Opinion Analysis Is Consistent With the Analysis Employed in Other Circuits and With the Decisions of this Court

This Court has never held, much less suggested, that allegedly false statements are to be viewed in a vacuum, devoid of context. To the contrary, this Court has always considered the totality of circumstances and avoided any blanket rules that would restrict protected speech. This Court has often considered the manner in which allegedly false material is presented and has placed considerable emphasis on form and content in determining whether a statement is actionable. *E.g.*, *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 12-13 (1970) (truthful and accurate reporting of what was said at public meetings on issues of public importance; charge of "blackmail" in context not actionable); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (accusation that "scabs" are "traitors"); *Time, Inc. v. Pape*, 401 U.S. 279, 290-92 (1971) (erroneous interpretation of government report not "actual malice"); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)

(presentation of disputed matter as fact rather than as contested allegation).

Through case-by-case adjudications, the courts of appeals have sought to give definition to the contours of the "breathing space" mandated by the First Amendment, recognizing, as does this Court, that "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678, 2695 (1989). Guided by such considerations, the courts of appeals have, almost in unison, attempted to articulate factors and guidelines to be used in making the required threshold determination of whether a particular statement in context is actionable as fact or protected as opinion, with no one factor being dispositive.

Petitioner asks this Court to blanketly reject the evolving common law opinion defense and return to pre-*Sullivan* days of strict liability when the mere repetition of biting and caustic remarks about public officials was actionable as seditious libel, regardless of context. Petitioner would have this and other courts ignore context for want of a better test. The merits of the many opinions and conclusions reported in a 628 page book of historical analysis and commentary, however, cannot be reduced to pithy factual statements and rendered actionable by simply considering isolated remarks apart from their literary, historical and public context.

This case does not even begin to approach the outer limits of protected expression. The challenged statements provide classic examples of opinions on dis-

closed facts, and fair report and comment on statements made in public proceedings, drawn from court records and statements in official proceedings, as to which protection has long been afforded at common law. As in *Greenbelt*, the charges and opinions are reported accurately and fully, and presented in the same context as they arose in public and court proceedings, often through the voices of the original speakers and through direct quotes of sworn testimony given in the various court proceedings. *See Greenbelt*, 398 U.S. at 14. The only truncation and distortion here is in the petition and not in the Book.

The court of appeals' overall analysis is entirely consistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The court of appeals correctly found that the author's method of presentation, and repeated use of qualifying language, viewed in its literary and political context, articulating a thesis and presenting arguments and theories against a backdrop of disputed allegations drawn from public records, would signal to any reader that the material reflected the opinion of the author and the quoted speakers.

The court of appeals gave due recognition to the public and political context of the subject matter, recognizing that the type of vigorous debate involved here is at the core of the First Amendment. (Pet. App. at A-4-7). Petitioner finds fault in the court of appeals' observation that even some false statements of fact must be protected to insure uninhibited and robust debate. (Pet. at 22-23). However, from *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964),

through *Hustler Magazine v. Falwell*, 108 S.Ct. 876, 880-81 (1988), this Court has recognized and noted that falsehoods are "inevitable in free debate."

B. The Court of Appeals Adhered to the Standards of Independent Review Laid Down by this Court

This Court has recently and repeatedly emphasized that "[j]udges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by clear and convincing proof of 'actual malice'." *Harte-Hanks*, *supra*, at 2695, *quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). In conducting this analysis, "the reviewing court must examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Harte-Hanks*, 109 S.Ct. at 2696, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), and *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

Based solely on an explanatory parenthetical indicating the limited weight of authority of a pre-*Anderson* Eighth Circuit decision in the opinion below (Pet. App. at A-14), petitioner suggests that the court of appeals applied a different legal standard of review (Pet. at 4, 28), when the opinion itself shows the contrary. The court of appeals' decision constitutes a careful, painstaking analysis, following *Anderson* and giving petitioner the benefit of all proper and allowable inferences, even where supported only by assertion and not evidence, consistent

with the standard previously employed in the Eighth Circuit and other courts in libel actions in a variety of factual settings. Petitioner's assertion that a different standard was applied is incorrect.

Petitioner's analysis of the court of appeals' decision, arguing that the court in effect established a new three-pronged analysis, first based on the opinion doctrine, then the neutral reportage doctrine and, lastly, actual malice to create an insurmountable barrier to public figure libel plaintiffs for the benefit of crafty writers (Pet. at 3, 15) is nonsense and finds no support in the opinions below.

C. The Neutral Reportage Doctrine Was Not Necessary to the Court of Appeals' Holding That There Was Not Sufficient Evidence of Actual Malice with Respect to Any Particular Statement

Petitioner's reliance on dictum concerning the still evolving neutral reportage privilege adopted by the Eighth Circuit in *Janklow v. Newsweek*, 759 F.2d 644 (8th Cir. 1985), and 788 F.2d 1300 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883 (1987) (finding the existence of a charge of rape against a public official to be a matter of historical fact accurately reported and non-actionable regardless of the author's motive in recounting the charge), and his argument that the author here relied solely on known criminals and unidentified sources in propogating rumors (Pet. at 4), is particularly misplaced given the overwhelming amount of official documentation and actual court proceedings upon which the author relied, substantial portions of which appear verbatim in the Book, and

the great evidence of care taken by the author to insure the accuracy of his account.

The court of appeals correctly concluded that Agent Price had not met his burden of producing clear and convincing evidence of actual malice. Not only did Price fail to show that the statements in dispute were known to be false, but Price failed to show that the disputed statements were in fact false. In short, there could be no finding of actual malice.

The court of appeals correctly relied on this Court's decision in *St. Amant v. Thompson*, 390 U.S. 727 (1968), in holding that a failure to investigate facts obtained from reliable sources does not constitute actual malice. Here, the court of appeals found the opinions and charges reported in the Book to be based on reliable, undisputed facts contained in official documents and court records.

The court of appeals also properly found, in line with this Court's recent decision in *Harte-Hanks*, and a long line of precedent, which the court of appeals considered in rendering its decision, that evidence of an author's general disposition toward a topic and his motives are not evidence of actual malice. As this Court re-emphasized in *Hustler Magazine v. Falwell*, 108 S.Ct. 876, 880-81 (1988), *quoting Garrison v. Louisiana*, 379 U.S. 64, 73 (1964), "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." By urging a finding of actual malice in the face of the record in this case, petitioner seeks to over-

turn this Court's decisions in *St. Amant*, *Greenbelt*, *Garrison*, *Hustler* and *Harte-Hanks*.

"[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984). As the court of appeals properly noted, "Price has turned the legal argument into the type of political rhetoric best left to open and free speech." (Pet. App. at A-40). "[T]he plaintiff's complaint has taken statements from their setting in a way that distorts the flavor of the book. In its entirety *Crazy Horse* focuses more on public institutions and social forces than it does on any public official. The sentiments it expresses are debatable. We favor letting the debate continue." (*Id.* at A-43).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN GARBUS*
RICHARD KURNIT
GERALD E. SINGLETON
Frankfurt, Garbus, Klein & Selz, P.C.
488 Madison Avenue
New York, New York 10022
(212) 980-0120
Attorneys for Viking Penguin, Inc. and Peter Matthiessen

**Counsel of Record*

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